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No. 03-1160

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Azel P. Smith, *et al.*,

Petitioners,

v.

City of Jackson, Mississippi, and
Police Department of the City of Jackson, Mississippi,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF THE PETITIONERS

Pamela S. Karlan
559 Nathan Abbott Way
Stanford, CA 94305

Dennis L. Horn
Horn & Payne, PLLC
P.O. Box 2754
Madison, MS 39130

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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QUESTION PRESENTED

Are disparate impact claims cognizable under the Age Discrimination in Employment Act?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Willie Allen; Joe L. Austin; Jerry Brister; Gloria Burns; Jacqueline Butler; Harvey L. Davis; William H. Gladney, Sr.; Tommie L. Grant; Ned Garner; William R. Gardner; Samuel Haymer; James J. Howard; Warren E. Hull; Thomas Hunter; Arlander Luallen, Jr.; Willie Mack; Eugene McDonald; Carey N. Parkinson; Ruthie Porter; Cleotha Ratliff; John M. Russell; David L. Shaw; Wayne Simpson, Jr.; Richard J. Smith; Kenneth W. Stemmons; James B. Strawbridge; Alphonso Taylor; Miller Weston; and Shirley Williams.

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BRIEF OF THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-38a) is published at 351 F.3d 183. The district court's order granting summary judgment in favor of respondents (Pet. App. 39a-49a), dated September 6, 2002, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2003. The petition for a writ of certiorari was filed on February 10, 2004, and was granted March 29, 2004. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The Age Discrimination in Employment Act ("ADEA") of 1967, as amended, provides in relevant part:

(a) It shall be unlawful for an employer—

* * * *

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age * * *.

* * * *

(f) It shall not be unlawful for an employer * * *—

(1) to take any action otherwise prohibited under subsection[] (a) * * * where the differentiation is based on reasonable factors other than age * * *.

29 U.S.C. 623.

The regulations adopted by the Equal Employment Opportunity Commission ("EEOC") to implement the ADEA provide in relevant part:

> When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity.

29 C.F.R. 1625.7(d).

STATEMENT

The question presented by this case is whether disparate impact claims are ever cognizable under the Age Discrimination in Employment Act. In other words, must the plaintiff in every ADEA case prove that the employer has purposefully chosen to disadvantage older workers, or can the plaintiff prevail by showing that a facially neutral policy has the consequence of disproportionately disadvantaging older workers and lacks a reasonable business justification?

The answer to the question presented is that the ADEA allows disparate impact claims. That conclusion is compelled and confirmed by regulations promulgated by the Equal Employment Opportunity Commission pursuant to notice-and-comment rulemaking. Those regulations, and their predecessors, have uniformly recognized the availability of disparate impact liability under the ADEA for more than thirty-five years. The regulations reflect the agency's expert understanding of the statute, for Congress designated the EEOC as the agency responsible for implementing the ADEA and gave it the power to promulgate regulations with the force of law. The regulations adhere to prior decisions by this Court construing the *identical* text of Title VII of the Civil Rights Act of 1964 to recognize disparate impact claims, see *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and the settled understanding that "the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII,'" *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978)). The EEOC's ADEA regulations accordingly constitute, at the least, a permissible reading of the statute and, as such, are entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).[1]

This case does not call on the Court to decide any issue beyond whether disparate impact claims are ever cognizable under the ADEA. See Pet. i. It presents no questions relating to the elements of a disparate impact claim, the defenses that might be available to employers, or the allocation of burdens of proof between the parties. The lower courts can and should address those issues in the first instance, consistent with Congress's intent that the statute be given a practical construction. More than three decades' experience with the ADEA, including the longstanding recognition of disparate impact claims by federal regulatory agencies and a substantial number of circuits, shows that a disparate impact standard is eminently workable.

The Fifth Circuit's decision, which holds that the ADEA categorically precludes disparate impact claims in all circumstances and regardless of the employer's inability to identify any business justification for practices that disadvantage the class of persons Congress determined to protect under the statute, should accordingly be reversed. The case should be remanded for the lower courts to consider in the first instance the application of a disparate impact standard to petitioners' particular challenge.

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[1] See also, *e.g.*, *Barnhart* v. *Thomas*, 124 S. Ct. 376, 380 (2003) ("[W]hen the statute 'is silent or ambiguous' [with respect to the issue at hand] we must defer to a reasonable construction by the agency charged with its implementation." (quoting *Chevron*, 467 U.S. at 843)); *Barnhart* v. *Walton*, 535 U.S. 212, 227 (2002) (Scalia, J., concurring in part and concurring in the judgment).

1. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court held that disparate impact claims are cognizable under Title VII. At issue in *Griggs* was section 703(a)(2) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(2), which makes it unlawful for an employer to "limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *Griggs* held that this language did not require the plaintiffs to show that their employer used the high school diploma and standardized test requirements challenged in that case for the purpose of excluding black workers from more desirable jobs; rather, it was sufficient to demonstrate that the power company's policies had a significant disproportionate impact on African-American employees and lacked a requisite business justification. See, *e.g.*, *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 609 (1993) (citing *Teamsters* v. *United States*, 431 U.S. 324, 335-36 n.15 (1977)); *Griggs*, 401 U.S. at 431 (disparate impact claims look beyond "overt discrimination * * * [to] practices that are fair in form, but discriminatory in operation").

In the Age Discrimination in Employment Act, Congress found both that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice," and that "certain *otherwise desirable practices* may work to the disadvantage of older persons." 29 U.S.C. 621(a)(2) (emphasis added). Congress drew the substantive prohibitions of the ADEA directly from Title VII, which had been enacted three years earlier. Section 4(a)(2) of the ADEA, in relevant part, renders it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. 623(a)(2). Thus, the prohibitory language of the ADEA traces the language of Title VII to the letter, simply

substituting "age" for "race, color, religion, sex, or national origin."

Congress delegated to the EEOC (and the Secretary of Labor before it) the authority to "issue such rules and regulations as [it] may consider necessary or appropriate for carrying out [the ADEA]." 29 U.S.C. 628.[2] In 1981, the EEOC promulgated a regulation – carrying forward the regulatory precedent promulgated by the Secretary of Labor upon the ADEA's enactment – recognizing disparate impact claims under the ADEA. 29 C.F.R. 1625.7(d). The EEOC's regulation has remained in effect for the past twenty-three years.

2. Petitioners in this case are police officers and public safety officers employed by respondents, the City of Jackson, Mississippi and its police department. Petitioners are all at least forty years of age and therefore fall within the class protected by the ADEA. See 29 U.S.C. 631(a).

Petitioners allege that changes to the respondents' pay policy for police and police safety officers violate the ADEA. After announcing a plan to raise the pay of its police officers, the City of Jackson adopted a Performance Pay Plan on October 1, 1998, and revised it effective March 1, 1999 ("Pay Plan"). Petitioners allege that the Pay Plan had a disparate impact on the class of employees protected by the ADEA by providing them with proportionately smaller wage increases than were granted to employees under the age of forty. Officers younger than forty received raises that were four standard deviations higher than those received by officers ages forty and over, and the average wage increases under the plan varied by age, with older officers receiving smaller increases than did younger ones. (Petitioners' separate claim that the Pay Plan constituted unlawful disparate treatment was re-

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[2] The ADEA originally assigned this authority to the Secretary of Labor. In 1978, that responsibility was reassigned to the EEOC. See Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (May 9, 1978).

manded by the court of appeals, see Pet. App. 27a, and is not at issue here.)

3. The district court granted respondents' motion for summary judgment on the purely legal ground that the ADEA categorically "does not allow for claims of disparate impact." Pet. App. 47a-48a.

A divided panel of the Fifth Circuit affirmed on the same ground. It rejected the longstanding holdings of the Second, Eighth, and Ninth Circuits that disparate impact claims are cognizable, adopting instead the contrary view of the First, Seventh, Tenth, and Eleventh Circuits.[3] The Fifth Circuit majority acknowledged the similarities between Title VII and the ADEA, but it placed heavy emphasis on one difference in the statutory text: the ADEA contains language, not found in Title VII, that permits employers to differentiate among employees based upon "reasonable factors other than age." 29 U.S.C. 623(f)(1). The majority found this provision analogous to the Equal Pay Act's exception for differential treatment based on "any other factor other than sex," *id.* § 206(d)(1), which (according to the Fifth Circuit) precludes disparate impact claims. Pet. App. 16a-17a. The majority also read the ADEA's legislative history as indicating Congress's intent to prohibit only intentional discrimination based on age, a fact that the court believed precluded the disparate impact method of proving discrimination claims. *Id.* 18a-22a.

In a footnote, the majority acknowledged that the EEOC had issued what it characterized as "guidelines for the conduct of ADEA cases" that recognized disparate impact claims. Pet. App. 10a n.5. It concluded, however, that "[s]uch guidelines are not entitled to *Chevron* deference" in light of *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000), which concerned in relevant part an opinion letter issued by the Department of Labor's Wage and Hour Division interpreting the Fair Labor Standards Act of 1938, and *EEOC* v. *ARAMCO*, 499 U.S. 244, 256-58 (1991), which concerned the EEOC's relatively informal guidance relating to the Civil Rights Act of 1964. Pet. App. 10a n.5. The majority further found the EEOC's regulation insufficiently persuasive to warrant deference. *Id.* 10a n.5.

[3] Compare Pet. App. 7a-8a with, *e.g.*, *Frank* v. *United Airlines, Inc.*, 216 F.3d 845, 856 (CA9 2000) (citing *Arnett* v. *Cal. Pub. Employees Ret. Sys.*, 179 F.3d 690, 696 (CA9 1999), vacated on other grounds and remanded by 528 U.S. 1111 (2000)), cert. denied, 532 U.S. 914 (2001); *Smith* v. *Xerox Corp.*, 196 F.3d 358, 367 (CA2 1999) (citing *Geller* v. *Markham*, 635 F.2d 1027, 1032 (CA2 1980)); *Lewis* v. *Aerospace Comty. Credit Union*, 114 F.3d 745, 750 (CA8 1997) (citing *Smith* v. *City of Des Moines*, 99 F.3d 1466, 1470 (CA8 1996)), cert. denied, 523 U.S. 1062 (1998).

Judge Stewart dissented. He would have held that disparate impact claims are cognizable under the ADEA. Pet. App. 28a-38a. He read the ADEA's "reasonable factors other than age" provision to codify a defense to disparate impact claims, just as Title VII has a defense for "business necessit[ies]." *Id.* 30a-31a. Judge Stewart criticized the majority's reliance on the Equal Pay Act for failing to account for the difference between the Equal Pay Act's use of the word "any" and the ADEA's more rigorous requirement that the other factors invoked by the employer be "reasonable." *Id.* 32a. Turning to the majority's assertion that the statute was intended to reach only purposeful discrimination, Judge Stewart reasoned that the ADEA, like Title VII, was intended to "rid[] from the workplace an environment of *concealed* discrimination" and that "a disparate impact theory may be a plaintiff's only tool in counteracting sophisticated discrimination." *Id.* 34a, 35a.

4. This Court subsequently granted certiorari. See 124 S. Ct. 1724 (2004).

SUMMARY OF ARGUMENT

A straightforward application of this Court's employment discrimination and administrative law precedents compels the conclusion that the ADEA permits disparate impact claims. This Court is not being asked to interpret the ADEA on a blank slate. Since the enactment of the ADEA in 1967, the

administrative agencies expressly charged by Congress with responsibility for promulgating regulations to carry out the provisions of the ADEA have consistently read the relevant Act to reach practices that have a disparate impact on older workers and that are not reasonably related to the job in question. The EEOC has so concluded for decades in regulations, as did the Secretary of Labor before it. See 29 C.F.R. 1625.7(d); Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981) (codified as amended at 29 C.F.R. pt. 1625); 33 Fed. Reg. 9172, 9173 (June 21, 1968) (codified at 29 C.F.R. 860.103 (1968)); 34 Fed. Reg. 322, 322-23 (Jan. 9, 1963) (codified at 29 C.F.R. 860.104)). Under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), the EEOC's interpretation is binding. Furthermore, Congress has repeatedly amended the ADEA without disturbing that consistent regulatory construction.

The administrative interpretation of the ADEA has the two principal hallmarks of agency action entitled to *Chevron* deference. First, Congress granted the agencies in question the statutory authority to promulgate regulations with the force of law. Second, the EEOC regulations that embody the disparate impact standard were promulgated pursuant to formal notice-and-comment rulemaking.

As for the merits of the consistent agency interpretation of the ADEA, the EEOC's regulations reflect an entirely reasonable construction of the statutory text. They adhere to this Court's holding in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), that the *identical* language of Title VII authorizes disparate impact claims. Indeed, *Griggs*, in combination with a long line of this Court's precedents holding that the ADEA and Title VII must be interpreted *pari passu*, makes clear that the EEOC's interpretation is not only reasonable, but inescapably correct.

An independent examination of the text and purposes of the ADEA confirms that *Griggs*, and in turn the EEOC's

regulations, properly (or, at the very least, reasonably) construe the statute. The ADEA provides that "otherwise prohibited" conduct is lawful when based on "*reasonable* factors other than age." 29 U.S.C. 623(f)(1) (emphasis added). That language rests on an assumption that some behavior will violate the ADEA even though it is motivated by factors other than the desire to treat older workers differently. Under the court of appeals' reading of the statute, however, the ADEA's "reasonable factors other than age" provision is surplusage.

The phrase "because of" does not limit the ADEA only to disparate treatment claims, any more than it does the *identical* text of Title VII. Rather, that phrase simply signifies causation and, in the context of this statute, is not limited to purposeful discrimination. For example, a strength test for a sedentary job that older workers disproportionately fail would cause those workers to lose their employment "because of" their age. If that test does not bear a reasonable relationship to the job, the test would violate the ADEA.

The EEOC's regulations are also supported by the congressional findings and legislative history of the ADEA. Both the findings and the Report that gave rise to the statute expressly refer to conduct that would give rise only to disparate impact, not disparate treatment, liability. Moreover, the purpose of the ADEA (like Title VII) is to eliminate workplace discrimination, and this Court's precedents establish that disparate impact claims further that goal in multiple respects: by combating discrimination that rests on subconscious stereotypes; by overcoming problems of proof raised by purposeful but veiled discrimination; and by addressing otherwise innocent practices that disadvantage protected employees but lack any reasonable business justification.

The Fifth Circuit's holding that the ADEA categorically prohibits disparate impact claims in all instances should accordingly be reversed, and the case remanded so that the lower courts can address the further issues raised by petition-

ers' claim, consistent with Congress's intention that the statute be given a practical construction.

ARGUMENT

This case presents the question whether the ADEA *categorically precludes* disparate impact claims. For the reasons described *infra*, the answer to that question is no. The case does *not* present any of the distinct questions relating to the scope or elements of such a cause of action or of defenses, such as the provision permitting differentiation among employees based on "reasonable factors other than age," 29 U.S.C. 629(f)(1). These questions were not litigated below and must be addressed by the lower courts in the first instance. In doing so, the lower courts can be expected to approach disparate impact liability "in a practical way," *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401 (2002), accounting for the policy and judicial manageability concerns the respondents have asserted.[4] In any event, even though ADEA disparate impact claims have been recognized by the regulatory agencies since 1968, see 33 Fed. Reg. 9173 (June 21, 1968), were uniformly recognized by the courts of appeals until 1993, and are still recognized in several circuits, none of these purported problems has yet manifested itself.

[4] For example, the EEOC has stated that "disparate impact 'is probably a more difficult claim to make under the ADEA than in a race or gender context because the impact of neutral policies which fall disproportionately on class members protected by the ADEA can be proven to be related to legitimate business reasons in more instances than those which might impact other protected groups.'" Br. of EEOC, *Sitko* v. *Goodyear Tire & Rubber* (CA6 No. 02-4083) 21 (quoting *Adams* v. *Florida Power Corp.*, 255 F.3d 1322, 1327 (CA11) (Barkett, J., concurring specially), cert. granted, 534 U.S. 1054 (2001), and cert. dismissed, 535 U.S. 228 (2002)).

I. The EEOC's Recognition Of Disparate Impact Claims Represents The Better Construction Of The ADEA.

A. The EEOC's Interpretation Is Faithful To This Court's Decision In *Griggs* v. *Duke Power Co.*, Which Construed The Identical Language Of Title VII, On Which Congress Modeled The ADEA.

1. The EEOC's regulations providing for disparate impact claims under the ADEA relied expressly on this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). See 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981). At issue in *Griggs* was section 703(a)(2) of the Civil Rights Act of 1964, the provision of Title VII that renders it unlawful for any employer "to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(2). This Court held that Title VII encompasses disparate impact claims. Particularly when it came to employment practices that disproportionately excluded members of a protected class, the Court found that "the conclusion is inescapable" that such practices cannot survive unless they are "job related." 401 U.S. at 436.

Griggs rests on a construction of the text of section 703(a)(2). "The objective of Congress in the enactment of Title VII is plain *from the language of the statute*." *Griggs*, 401 U.S. at 429 (emphasis added). The "thrust" of section 703(a)(2) was to address "the *consequences* of employment practices, not simply the motivation." *Id.* at 432. As this Court subsequently confirmed, *Griggs*'s recognition of disparate impact claims "reflects *the language of § 703(a)(2)* and Congress' basic objectives in enacting the statute." *Connecticut* v. *Teal*, 457 U.S. 440, 448 (1982) (emphasis added).

Congress itself has twice embraced this Court's holding in *Griggs* that the language of section 703(a)(2) encompasses

disparate impact claims. When Congress amended Title VII in 1972 to extend the Act's protections to government employees, it "recognized and endorsed * * * [*Griggs*'s] disparate-impact analysis." *Connecticut* v. *Teal*, 457 U.S. 440, 447 n.8 (1982). Subsequently, the Civil Rights Act of 1991 "confirm[ed] [the] statutory authority and provide[d] statutory guidelines for the adjudication of disparate impact suits under title VII." Civil Rights Act of 1991, § 3(3), 42 U.S.C. 1981 note.[5] Both times, in reaffirming the cognizability of disparate impact claims, Congress left untouched the prohibitory language of section 703(a)(2). Clearly, then, Congress considers its original language – that it shall be unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin" – entirely adequate to reach disparate impact claims.[6]

2. The provision of the ADEA at issue in this case, section 4(a)(2), exactly parallels the provision of Title VII at issue in *Griggs*. The only difference is that the ADEA prohibits employer conduct with an adverse impact on the basis of "age." 29 U.S.C. 623(a)(2). The EEOC was thus surely correct in determining that the better reading of the ADEA is the one that parallels this Court's construction of the identical language of Title VII, a construction Congress has expressly and repeatedly embraced. At the very least, the EEOC's construction was certainly not unreasonable.

[5] See 42 U.S.C. 2000-e2(k)(1)(A) ("An unlawful employment practice based on disparate impact is established" if "a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of a [protected trait] and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."). See generally *id.* § 2000-e2(k).

[6] Cf. *Keene Corp.* v. *United States*, 508 U.S. 200, 212 (1993) (congressional statutes are presumed to have adopted the extant holdings of the Supreme Court); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Not only is similarity of language generally "a strong indication that the two statutes should be interpreted *pari passu*," *Northcross* v. *Board of Education*, 412 U.S. 427, 428 (1973),[7] but this is the paradigmatic case for the application of that principle of statutory construction. The relevant provisions of Title VII and the ADEA do not merely share a single word or a discrete phrase, but rather are identical. Nor is this similarity merely fortuitous. As this Court has observed, Congress took the prohibitory language of the ADEA "*in haec verba* from Title VII." *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978)). Further, "the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace." *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979). See also *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995); *Lorillard*, 434 U.S. at 584; cf. *Northcross*, 412 U.S. at 428 (presumption in favor of interpreting identical language similarly is en-

[7] See also, *e.g.*, *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) ("[Congress] used the same words [in section 1964(c) of RICO as it had in section 7 of the Sherman Act and section 4 of the Clayton Act], and we can only assume it intended them to have the same meaning that courts had already given them."); *U.S. Dep't of Energy* v. *Ohio*, 503 U.S. 607, 626 (1992) ("Congress' use of the same language in § 1323(a) [of the Clean Water Act as in 28 U.S.C. 1331] indicates a likely adoption of our prior interpretation of that language."); *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478 (2001) (noting that the phrase "final action" "bears the same meaning in § 307(b)(1) [of the Clean Air Act] that it does under the Administrative Procedure Act"); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 221 (2001) (Scalia, J., concurring in the judgment).

hanced when "the two provisions share a common *raison d'être*" (quoting *Johnson* v. *Combs*, 471 F.2d 84, 86 (CA5 1972))).[8]

On those bases, this Court has repeatedly given the same construction to the substantive provisions of Title VII and the ADEA. In *Oscar Mayer*, this Court held that because section 14(b) of the ADEA, 29 U.S.C. 633(b), "is almost *in haec verba* with," and was derived from, section 706(c) of Title VII, it "may properly conclude that Congress intended that the construction of [the ADEA provision] should follow that of [the Title VII provision]." 441 U.S. at 756. This Court concluded in *Western Air Lines, Inc.* v. *Criswell* that the bona fide occupational qualification (BFOQ) exception to the ADEA, "like its Title VII counterpart, * * * 'was in fact meant to be an extremely narrow exception to the general prohibition' of age discrimination contained in the ADEA." 472 U.S. 400, 412 (1985) (quoting *Dothard* v. *Rawlinson*, 433 U.S. 321, 334 (1977)). Subsequently, *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 123-24 (1988), held that rules for timely filing a complaint under the ADEA applied equally to Title VII, because the former statute was derived from the latter and the two provisions were "virtually *in haec*

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[8] In *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), this Court summarized the relationship between the statutes in sustaining a claim for relief under the ADEA:

> The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. * * * The substantive, antidiscrimination provisions of the ADEA are modeled upon the prohibitions of Title VII. * * * The ADEA and Title VII share common substantive features and also a common purpose: the elimination of discrimination in the workplace.

Id. at 357-58 (citations and internal quotation marks omitted).

verba." And in *Trans World Airlines*, this Court followed Title VII precedent in holding that the ADEA bars employers from doling out a benefit that is "part and parcel of the employment relationship" in a discriminatory fashion. 469 U.S. at 121 (quoting *Hishon* v. *King & Spaulding*, 467 U.S. 69, 75 (1984)).[9]

The cases in which this Court has treated Title VII and ADEA claims differently have generally involved differences in the text and statutory structure outside the scope of the two statutes' identical liability provisions. For example, in *EEOC* v. *ARAMCO*, 499 U.S. 244, 258-59 (1991), the Court declined to apply Title VII extraterritorially in part be-

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[9] See also, *e.g.*, *Olmstead* v. *L.C.*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) (noting that the Court has "incorporated Title VII standards of discrimination when interpreting statutes prohibiting other forms of discrimination," and that the Court's "interpretation of Title VII * * * applies with equal force in the context of age discrimination" because the ADEA's substantive provisions were derived from Title VII (quoting *Trans World Airlines, Inc.*, 469 U.S. at 121)); *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 109-12 (1991) (in considering the preclusive effect of state administrative findings on ADEA actions in federal court, the Court construed the relevant ADEA provision as it had the relevant provision in "the closely parallel context" of Title VII, even though the ADEA text was not identically worded); *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am., UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (noting that this Court has read narrowly the bona fide occupational qualification defense in Title VII, and that this Court has "read the BFOQ language of § 4(f) of the [ADEA], which tracks the BFOQ provision in Title VII, just as narrowly" (citation omitted)); cf. *Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 548 (1999) (Stevens, J., concurring in part and dissenting in part) (noting that the Title VII punitive damages standard enacted in the Civil Rights Act of 1991 is "the same intent-based standard used in the [ADEA]"); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 144-45 (1990) (interpreting section 502(a) of ERISA commensurately with the provision of the Labor Management Relations Act on which it was modeled).

cause Congress had legislatively overruled prior judicial decisions declining to apply the ADEA overseas but had not similarly amended the text of Title VII. Similarly, in *Stevens* v. *Department of the Treasury*, 500 U.S. 1, 7 (1991), this Court construed a provision of the ADEA regarding the relative timing of EEOC administrative claims and civil lawsuits; the Court noted that the language of the ADEA provision stood in "marked contrast" to Title VII's requirements. And in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), this Court held that litigants in ADEA cases have the right to trial by jury, even assuming that parties in Title VII suits did not enjoy that right. The Court's conclusion rested on the fact that "rather than adopting the *procedures* of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedures even while adopting Title VII's *substantive* prohibitions." *Id.* at 584-85 (emphases added).[10]

This Court's recent decision in *General Dynamics Land Systems, Inc.* v. *Cline*, 124 S. Ct. 1236 (2004), similarly focuses on a concrete difference in the statutory text. In *Cline*, this Court held that the ADEA does not prohibit discrimination against *younger* workers within the ADEA's protected class. In rejecting an analogy to Title VII, which prohibits race and sex discrimination against white and male employees as well as against minorities and women, the Court reasoned:

> The term "age" employed by the ADEA is not * * * comparable to the terms "race" or "sex" employed by Title VII. "Race" and "sex" are general terms that in every day usage require modifiers to indicate any relatively narrow application. We do not commonly understand "race" to refer only to the black

[10] In *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), in which the Court held that an employee was contractually bound to arbitrate an ADEA case, the Court distinguished prior precedent in the Title VII context; the difference, however, turned not on any difference between the two statutes, but on a difference in the nature of the contracts requiring arbitration.

> race, or "sex" to refer only to the female. But the prohibition of age discrimination is readily read more narrowly than analogous provisions dealing with race and sex.

Id. at 1247. In short, in *Cline*, the ADEA and Title VII could not be interpreted *pari passu* because (in contrast to this case) the operative language of the ADEA was *not* derived *in haec verba* from Title VII.

B. The Text Of The ADEA Supports The EEOC's Determination That Disparate Impact Claims May Be Brought Under The ADEA.

Despite the identity between section 703(a)(2) of Title VII, which undeniably encompasses disparate impact claims, and section 4(a)(2) of the ADEA, two textual arguments have been advanced to support the conclusion that Congress did not intend to recognize disparate impact claims under the ADEA. First, the Fifth Circuit relied heavily on the fact that, unlike Title VII, the ADEA contains a provision that permits an employer to engage in "otherwise prohibited" conduct "where the differentiation is based on reasonable factors other than age." 29 U.S.C. 623(f)(1) (hereinafter, the "RFOA provision"). See Pet. App. 14a-15a. Second, other courts have argued (although the Fifth Circuit did not) that the ADEA's bar on discrimination "because of" age embodies a purpose requirement (notwithstanding that this Court held in *Griggs* that the identical language of Title VII recognizes disparate impact claims). Neither argument is persuasive.

1. The ADEA's "Reasonable Factors Other Than Age" Provision Reinforces The Conclusion That Disparate Impact Claims Are Cognizable.

1. The court of appeals discounted the identity of the prohibitory language in Title VII and the ADEA, relying instead on a rough similarity between the ADEA's RFOA pro-

vision and a phrase that appears in the EPA.[11] See Pet. App. 15a-17a. It reasoned that disparate impact claims are precluded under the Equal Pay Act because the Act permits differential treatment based on "any factor other than sex," and that exception cannot be distinguished from the RFOA provision of the ADEA. See *id.*

The Fifth Circuit trebly erred. First, there is in fact a crucial textual difference between the two provisions that the court of appeals deemed indistinguishable. The ADEA protects an employer only when it has acted on the basis of a

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[11] The ADEA and the Equal Pay Act have very different structures. The phrase on which the majority below relied is buried in the middle of the prohibitory language of the Equal Pay Act, which provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential *based on any other factor other than sex*: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. 206(d)(1) (emphasis added).

The Equal Pay Act also reaches only a subset of the practices covered by the ADEA and Title VII, because it addresses only wages and compensation. A broader reading of the Equal Pay Act would render Title VII's express application to discrimination on the basis of "sex" surplusage.

"*reasonable* factor other than age," 29 U.S.C. 623(f)(1) (emphasis added), while the Equal Pay Act permits differential pay based on "*any* other factor other than sex," 29 U.S.C. 206(d)(1) (emphasis added), even if that factor is objectively *un*reasonable.

Indeed, the RFOA provision affirmatively supports the conclusion that the ADEA recognizes disparate impact claims. The text of section 4(f)(1) addresses actions that would "*otherwise*" be prohibited under section 4(a) and encompasses two categories of employment practices: (1) those where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," and (2) those "where the differentiation is based on reasonable factors other than age." 29 U.S.C. 623(f)(1). The first category insulates from liability certain forms of purposeful discrimination, in which an employee's age is a genuine measure of whether the employee can do the job – for example, younger police officers might be required for undercover work at a high school. By contrast, the second category, the RFOA provision, cannot be read to shield from liability *any* category of intentional discrimination on the basis of age: by its very language, it applies only when employees are treated differently on the basis of some other factor. This provision necessarily implies that it is possible to violate section 4(a) through differentiation based on a factor other than age – that is, without having a discriminatory purpose.[12]

The RFOA provision thus specifies that no disparate impact claim will lie unless that non-age factor is *unreasonable* – a requirement that would be mere surplusage if no disparate impact claims were cognizable in the first place. As the EEOC has explained, "If § 623(f)(1) exempted all age-neutral

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[12] To prove an ADEA disparate *treatment* claim, a plaintiff necessarily must prove that the employer differentiated based on age specifically – not based on any other factor, even if that factor is closely correlated with age. See *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 611-12 (1993).

practices from the ADEA, the term 'reasonable' would be meaningless. The more logical interpretation of the provision is that Congress intended to set some limits on the use of age-neutral factors that have an adverse effect on older workers, in keeping with the type of business-necessity justification that the Supreme Court first recognized in *Griggs*." Br. of EEOC, *Sitko* v. *Goodyear Tire & Rubber* (CA6 No. 02-4083) 7 (citation omitted). Accordingly, the EEOC has specified that under its regulations a disparate impact on protected employees may give rise to liability, but not in cases in which the policy causing the disparate impact is a "*reasonable* measure of job performance." Br. of EEOC, *Meacham* v. *Knolls Atomic Power Lab.* (CA2 No. 02-7474) 7 (quoting *Bryant* v. *City of Chicago*, 200 F.3d 1092, 1098-99 (CA7 2000)) (emphasis added).[13]

The Fifth Circuit's next error was that there is no basis for either its guess that the Equal Pay Act likely "spawned" the RFOA provision, or its conclusion that Congress therefore intended the scope of the ADEA's prohibition to track that of the EPA.[14] In fact, the RFOA provision "was derived from an

[13] The EEOC's ADEA implementing regulations provide that the employer may defend its conduct as a "business necessity," 29 C.F.R. 1625.7(d), a term that the EEOC construes to mean "reasonable." The EEOC took the term "business necessity" from this Court's decision in *Griggs*, 401 U.S. at 431, which explained that employers may use "*reasonable* measure[s] of job performance," *id.* at 436 (emphasis added). This case does not present the question whether the business necessity defenses available under the ADEA and Title VII differ.

[14] See *Adams* v. *Fla. Power Corp.*, 255 F.3d 1322, 1329 (CA11) (Barkett, J., specially concurring) (criticizing the analogy between the EPA and the ADEA in part on the ground that disparate impact "concerns the substantive provisions of the ADEA, which have been recognized to share common substantive provisions as Title VII, and not the remedial provisions of the ADEA which are similar to the remedial provisions of the EPA"), cert. granted, 534 U.S. 1054 (2001), and cert. dismissed, 535 U.S. 228 (2002).

equal-pay bill that was never enacted." Michael Evan Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967*, 25 BERKELEY J. EMP. & LAB. L. 1, 58-62 (2004). See also H.R. 5110, 88th Cong. (1963) (early version of the equal pay bill allowing an exception for "*reasonable* differentiation based on a factor or factors other than sex" (emphasis added)).

Third, even if the ADEA's requirements *did* track those of the Equal Pay Act, the Fifth Circuit would in any event have been mistaken in asserting that disparate impact claims were therefore barred. This Court has never held that disparate impact claims are unavailable under the Equal Pay Act. The decision cited by the court of appeals, *County of Washington* v. *Gunther*, 452 U.S. 161, 170 (1981), held that employers may prevail if "their pay differentials are based on a *bona fide* use of 'other factors other than sex'" (emphasis added). As several courts of appeals have held after *Gunther*, under this "bona fide" requirement, the employer's policy must be "reasonable" and related to valid business concerns; claims alleging a disparate impact on pay resulting from the use of unreasonable criteria other than sex are thus permissible.[15]

[15] See, *e.g.*, *Cullen* v. *Indiana Bd. of Trustees*, 338 F.3d 693, 699 (CA7 2003) ("the EPA does not require proof of discriminatory intent"); *Aldrich* v. *Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (CA2 1992) (requiring that the "employer prove[] that the job classification system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue"); *EEOC* v. *J.C. Penney Co.*, 843 F.2d 249, 253 (CA6 1988) (the provision "cannot constitute a blanket bar to all claims of wage discrimination based on disparate impact because the 'factor other than sex' defense does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason") (emphasis in original). Contra *Adams* v. *Fla. Power Corp.*, 255 F.3d 1322, 1325

2. The Phrase "Because Of" In Subsection (a)(2) Does Not Preclude Disparate Impact Claims.

The argument that the phrase "because of" precludes disparate impact claims under the ADEA is almost incomprehensible given the presence of precisely the same language in Title VII. *Griggs* and its progeny expressly rely on the text of Title VII in recognizing disparate impact claims. See *supra* Part I-A. Thus, to the extent respondents rely on the phrase "because of" in section 4(a)(2), they are inescapably arguing that *Griggs* was wrongly decided. But this case presents no circumstance that warrants reversing *Griggs*, particularly given Congress's subsequent, repeated endorsement of that decision. *Stare decisis* is thus decisive.[16]

In any event, the phrase "because of" – unlike such terms as "willfully," or "purposefully," or "knowingly" – does not refer to an actor's state of mind in all (or even most) contexts, including in the ADEA. Rather, it refers to causation. The nature of the causation depends on context. In some contexts, that causation may turn on an actor's motivation, as when an employer refuses to hire an older worker because he assumes that the older worker will be less productive than a younger one. There, age is both a "but for" cause of the failure to hire and a motivation.

(CA11), cert. granted, 534 U.S. 1054 (2001), and cert. dismissed, 535 U.S. 228 (2002); *Mullin* v. *Raytheon Co.*, 164 F.3d 696, 702 (CA1 1999); *Ellis* v. *United Airlines, Inc.*, 73 F.3d 999, 1008 (CA10 1996).

[16] See, *e.g.*, *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); see also *Hohn* v. *United States*, 524 U.S. 236, 261-62 (1998) (Scalia, J., dissenting) (arguing that Congress's reliance upon an unrepudiated decision in creating a procedural scheme is a "special reason" for according *stare decisis* effect).

But a policy can "adversely affect [an employee] because of such individual's age" (29 U.S.C. 623(a)(2)) even if that policy is not motivated by age. For example, a physical strength test that adversely affects older employees does so *because* of their age (assuming, as a plaintiff would have to prove, that physical strength is negatively correlated with age), and the ADEA would bar such a test unless it were reasonable for the particular job. See EEOC *Sitko* Br. 21 ("[I]t might be perfectly legitimate for an employer to adopt a strength test for an iron worker's job – even if the effect of doing so is to disqualify a disproportionate number of older workers. But that would not be true for a sedentary job such as a librarian. In that case, a strength test would be an unreasonable barrier to employment for older workers while serving no legitimate interest of the employer." (citation omitted)).

This understanding of "because of" is reinforced by the grammatical structure of section 4(a)(2). The phrase "because of such individual's age" in the Act plainly describes the "[e]ffect" on the employee. Had Congress wished to restrict the ADEA to purposeful discrimination, it would more naturally have placed the words "because of" far earlier in the provision, such that they would have described the *employer's* acts: "It shall be unlawful for an employer, *because of an employee's age*, to limit, segregate, or classify * * *." Even more clearly, had Congress wished to restrict the ADEA to purposeful discrimination, it could have included words such as "willful," "purposeful," "knowing," "deliberate," or "malice" in the statutory language. Cf. 42 U.S.C. 1981a(b)(1) (providing for punitive damages in Title VII cases when the plaintiff can show "malice" or "reckless indifference").

The statute's grammar moreover precludes reading the text as if the employer's conduct is directly modified by the "because of" clause. In section 4(a)(2), the conduct describes employees in the plural form; the "because of" clause takes the singular form. Thus, the Fifth Circuit's decision requires reading the statute to render it unlawful for an employer "to

limit, segregate, or classify his *employees* * * * because of such *individual's* age." By contrast, petitioners' reading is grammatically correct: with respect to any petitioner, the statute renders presumptively unlawful conduct that would "adversely affect *his* status as an *employee*, because of such *individual's* age."

The merit of the EEOC's reading is also apparent from the contrast between section 4(a)(2) and the RFOA provision in section 4(f)(1). The RFOA provision uses language that *does* of necessity connote intentionality. It refers to "differentiation * * * *based on* reasonable factors other than age." 29 U.S.C. 623(f)(1) (emphasis added). The phrase "based on" means "founded on" or "derived from," and accordingly does generally refer to purpose or reasoning. See THE NEW OXFORD AMERICAN DICTIONARY 135 (2001) (the first definition of "base" and "be based" is "have as the foundation for (something); use as a point from which (something) can develop"). Thus, after the plaintiff has demonstrated a disparate impact, such that the defendant is liable under section 4(a)(2), the court *then* must consider the factor that *motivated* the employer, and determine whether that factor was reasonable.

But even if (contrary to the foregoing) the phrase "because of" were instead read to refer only to intentional discrimination, disparate impact claims would still be a cognizable method of proof. As we explain *infra* Part I-C, by forcing employers to articulate reasonable, non-discriminatory justifications for policies that have a disparate impact on older workers, disparate impact claims ferret out intentional discrimination that is couched in non-discriminatory terms. Thus, whether "because of" is construed as referring to causation (as petitioners contend) or instead only to intent (as respondents contend), disparate impact claims are cognizable.

C. The Purpose Of The ADEA Confirms The EEOC's Conclusion That Disparate Impact Claims Are Cognizable.

1. The EEOC's regulatory determination that the ADEA reaches disparate impact claims is reinforced by Congress's purpose in enacting the statute. The best evidence of Congress's purpose, of course, is the ADEA's text, which, like Title VII, provides for disparate impact liability. See *supra* Parts I-A & -B. Moreover, the "ADEA and Title VII share" not merely "common substantive features," but also "a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) (quoting *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979)). As this Court recognized in *Griggs*, disparate impact liability is essential to achieving this purpose, because facially neutral treatment when applied to people who are not equally situated can simply entrench that inequality:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has – to resort again to the fable – provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.

401 U.S. at 431.

The congressional findings accompanying the ADEA similarly recognize the need for disparate impact liability. Congress went beyond addressing facially discriminatory practices, such as "the setting of arbitrary age limits regardless of potential for job performance," to recognize as well that "certain *otherwise desirable practices* may work to the

disadvantage of older persons." 29 U.S.C. 621(a)(2) (emphasis added). Similarly, the report of the Department of Labor (the so-called Wirtz Report) that Congress requested and which provided the underpinnings to the ADEA, advised Congress that it would be "futile as public policy, and even contrary to the public interest," to focus solely on the elimination of explicit age limits. U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964* (1965) [hereinafter Wirtz Report] at 21, *reprinted in* EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 37 (1981) [hereinafter LEGISLATIVE HISTORY]. Instead, the Report noted that legislation should address other sources of age discrimination, such as "employment security and income maintenance programs [that] are having a *wholly unintended adverse effect* on the position of older workers who are unemployed." *Id.* (emphasis added). And the Report identified the larger problem of "institutional arrangements that indirectly restrict the employment of older workers." *Id.* at 15-17, *reprinted in* LEGISLATIVE HISTORY at 32-34. The Report concluded that "[t]o eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite *unintentionally* lead to age limits in hiring." *Id.* at 22, *reprinted in* LEGISLATIVE HISTORY at 38 (emphasis added).

Of note, the Wirtz Report cites as an improper employment practice precisely the job criterion that this Court struck down in *Griggs* under a disparate impact theory: a requirement that new employees have graduated from high school that reflects no relationship to job performance. The Report observes that "[a]ny employment standard" of this sort "will obviously work against the employment of many workers – unfairly, if despite his limited schooling, an older worker's years of experience have given him the relevant equivalent of

a high school education." Wirtz Report at 3, *reprinted in* LEGISLATIVE HISTORY at 21.

To be sure, this Court indicated in *Hazen Paper* that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA." 507 U.S. at 610. But "the essence" is not the same thing as "the entirety," and *Hazen Paper* expressly avoided addressing the availability of disparate impact claims. *Id.* "Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Int'l B'hood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). Yet Title VII recognizes disparate impact claims. Both Title VII and the ADEA thus illustrate the fact that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

2. The EEOC has thus rightly concluded that disparate impact liability is essential to achieving Congress's goals in enacting the ADEA. Categorically prohibiting such claims would, the EEOC has explained, "greatly weaken[] the protections of the ADEA because it [would] allow[] employers to use arbitrary employment practices that disproportionately screen out older workers. When these practices have no connection to the requirements of the job, they undermine the purpose of the ADEA – 'to promote employment of older persons based on their ability rather than age.' 29 U.S.C. § 621(b)." EEOC *Sitko* Br. 1.

Disparate impact claims are a vital tool for combating workplace discrimination, including age discrimination. Members of the protected group may be the victims of "subconscious stereotypes and prejudices," *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988), that disadvantage them, even when an employer does not engage in knowing discrimination. In the age context in particular, there is an

acute problem of subconscious discrimination that by definition cannot be combated through disparate treatment liability alone. See *Gen. Dynamics Land Sys.* v. *Cline*, 124 S. Ct. 1236, 1242 (2004) (recognizing that older workers are "more apt to be tagged with demeaning stereotype[s]"); *EEOC* v. *Wyoming*, 460 U.S. at 231 (recognizing that the ADEA seeks to proscribe age discrimination "based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes"). Inappropriate age-based distinctions are generally rooted not in bigotry but in ignorance and false assumptions. "Age stereotypes persist because people tend not to examine the basis for these stereotypes and also give disproportionate weight to any data they believe tend to support them." RAYMOND F. GREGORY, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE 26-27 (2001). Employers therefore tend not to self-police their policies for those that will disproportionately disadvantage the elderly with no legitimate business justification. Steven J. Kamenshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 318 (1990).

Disparate impact liability is furthermore essential because otherwise even purposeful discrimination may escape detection and proof. In *EEOC* v. *Wyoming*, this Court recognized that intentional discrimination is often cloaked through the use of pretextual justifications. 460 U.S. 226, 231 (1983). "[T]he disparate impact theory of liability is designed as a means to *detect* employment decisions that reflect 'inaccurate and stigmatizing stereotypes.' This is precisely the determination that *Hazen Paper* says the ADEA is intended to outlaw." *EEOC* v. *Francis W. Parker Sch.*, 41 F.3d 1073, 1080-81 (CA7 1994) (Cudahy, J., dissenting), cert. denied, 515 U.S. 1142 (1995). See also Jan W. Henkel, *The Age Discrimination in Employment Act: Disparate Impact Analysis and the Availability of Liquidated Damages After* Hazen Paper Co. v. Biggins, 47 SYRACUSE L. REV. 1183, 1185 (1997) (observing that disparate impact analysis was intended to be a

"potent tool * * * for older Americans who fall victim to employers able to cloak their actions in economics or feigned ignorance").

Finally, policies that disparately harm protected groups may be harmful even if the employer's motivation (conscious or subconscious) is entirely innocent. A "facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices." *Watson*, 487 U.S. at 990. And "good intent or absence of discriminatory intent does not redeem employment procedures * * * that operate as 'built-in headwinds' for [protected groups] and are unrelated to measuring job capability." *Griggs*, 401 U.S. at 432. "The disparate-impact theory serves a vital role in preventing arbitrary employment practices that disadvantage protected workers without serving employers' legitimate business interests. These practices are just as pernicious when the protected group is older workers as when it is a racial minority." EEOC *Sitko* Br. 4.[17]

II. The EEOC's Regulations Are Entitled To *Chevron* Deference.

The EEOC's regulations providing that disparate impact claims are cognizable under the ADEA and the guidance previously provided by the Department of Labor have all the hallmarks of agency determinations entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Coun-*

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[17] To be sure, age discrimination does not carry with it all of this history and profound prejudice underlying race discrimination. But Title VII notably is not limited to race discrimination, and the "principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent" is not limited "to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988). See, *e.g.*, *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (claim of disparate impact on the basis of gender).

cil, Inc., 467 U.S. 837 (1984). This Court's precedents establish the following factors as especially important in identifying agency regulations that merit *Chevron* deference: (1) whether Congress has expressly authorized the agency "to engage in the process of rulemaking * * * that produces regulations * * * for which deference is claimed," and (2) whether the regulations are the "fruit[] of notice-and-comment rulemaking." *United States* v. *Mead Corp.*, 533 U.S. 218, 229, 230 (2001). Both of these criteria are satisfied here.[18]

First, Congress specifically authorized the EEOC (and the Secretary of Labor before it) to promulgate "such rules and regulations as [the Commission] may consider necessary or appropriate for carrying out" the ADEA and to establish "such reasonable exemptions to and from any or all provisions of this Act as [it] may find necessary and proper in the public interest." 29 U.S.C. 628. See also, *e.g.*, *Clackamas Gastroenterology Assocs., P.C.* v. *Wells*, 538 U.S. 440, 448, 448-51 (2003) (noting that the EEOC "has special enforcement responsibilities" under several federal antidiscrimination statutes, including the ADEA); *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 412 (1985) (noting that the EEOC and the Secretary of Labor are "the administrative agencies charged with enforcing the [ADEA]").

Second, the EEOC adopted the disparate impact regulation in question pursuant to notice-and-comment rulemaking, and indeed "made changes to the regulation in response to public comment." EEOC *Sitko* Br. 12 (citing 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981)). See 44 Fed. Reg. 37,974 (June 29, 1979); 44 Fed. Reg. 68,858 (Nov. 30, 1979); 46 Fed. Reg. 47,724 (Sept. 29, 1981). By comparison, the EEOC regulations embracing a disparate impact standard under Title VII – regulations to which this Court accorded "great deference" in *Griggs* v. *Duke Power*, 401 U.S. 424, 434 (1971) – were adopted under far less formal circumstances, neither pursuant to an express congressional delegation of rulemaking authority nor following notice and the opportunity for public comment. See, *e.g.*, 35 Fed. Reg. 12,333 (Aug. 1, 1970).

[18] Notably, the courts of appeals have applied *Chevron* deference to the EEOC's regulatory interpretations of the ADEA in numerous cases. See, *e.g.*, *Sanchez* v. *Pacific Powder Co.*, 147 F.3d 1097, 1099-1100 (CA9 1994); *Kralman* v. *Ill. Dep't of Veterans' Affairs*, 23 F.3d 150, 155 (CA7 1994).

In both these respects, the EEOC's ADEA disparate impact regulation differs from the EEOC interpretations of Title VII to which this Court has previously declined to defer. In *EEOC* v. *ARAMCO*, 499 U.S. 244, 256-58 (1991), on which the Fifth Circuit relied in this case, and which followed *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 140-46 (1976), this Court pointed to the EEOC's lack of substantive rulemaking authority under Title VII. That criterion, whatever its significance in the Title VII context, see *ARAMCO*, 499 U.S. at 259-60 (Scalia, J., dissenting), is inapplicable to the ADEA, which unambiguously gives just such authority to the EEOC. Compare 29 U.S.C. 628 (permitting the EEOC to "issue such rules and regulations as it may consider necessary or appropriate for carrying out [the ADEA]") with 42 U.S.C. 2000e-12(a) (permitting the EEOC "to issue * * * suitable *procedural* regulations to carry out [Title VII]") (emphasis added).

Furthermore, as discussed *supra*, none of the Title VII interpretations at issue in these cases have been a product of notice-and-comment rulemaking like the ADEA regulations at issue here. Compare *ARAMCO*, 499 U.S. at 256-57 (denying deference to an intra-litigation policy statement, a letter, testimony by its Chairman, and a Commission decision). This factor similarly distinguishes *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000), on which the Fifth Circuit also mistakenly relied. In *Christensen*, this Court refused to accord *Chevron* deference to a Department of Labor opinion letter, which lacked the force of law and which interpreted an ambiguous Department of Labor regulation, rather than a rule arrived at after notice-and-comment rulemaking and which interprets the congressional statute itself. 529 U.S. at 586-87.

To be sure, the EEOC labeled the regulations at issue in this case as "interpretive." But the only purpose of that designation was to allow the EEOC to "invok[e] an exception to the 30-day delay in effective date required by 5 U.S.C. § 553(d)." EEOC *Sitko* Br. 13. This Court's precedents reject the suggestion that the application of *Chevron* deference should turn on the regulation's mere labeling or the observance of a thirty-day delay. No such delay was observed in the interpretive regulations at issue in *Chevron* itself, which went into effect the day they were promulgated. See 467 U.S. 837, 840-41 (1984); 46 Fed. Reg. 50,766 (Oct. 14, 1981). And such a delay would in no way have enhanced the EEOC's expertise or the soundness of its judgment, which has remained unchanged for the subsequent twenty-three years.

Moreover, this Court has recognized that interpretive regulations may properly warrant *Chevron* deference even when *no* notice-and-comment procedures are involved. *Mead*, 533 U.S. at 230-31; *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (agreeing with the EEOC's interpretation while noting that "deference under [*Chevron*] does not necessarily require an agency's exercise of express notice-and-comment rulemaking power"); see *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995) (deferring to a letter of the Comptroller of the Currency because he "is charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws" (quoting *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987))); see also *Edelman*, 535 U.S. at 123-24 (Thomas, J., concurring) (arguing that *Chevron* deference is appropriate even to an EEOC Title VII interpretive regulation adopted without notice-and-comment procedures because it was "codified in the Code of Federal Regulations, and so is binding on all the parties coming before the EEOC, as well as on the EEOC itself"); *Christensen*, 529 U.S. at 590-91 (Scalia, J., concurring in part and concurring in the judgment) (reciting cases in which this Court has accorded

Chevron deference to "authoritative agency positions set forth in a variety of" formats other than legislative regulations, including a longstanding interpretation embodied in a no-action notice).

Several additional factors compel the application of *Chevron* deference in this case. First, the Commission and, before it, the Department of Labor have maintained the same interpretation of the ADEA consistently for decades. See *Barnhart* v. *Walton*, 535 U.S. 212, 221-22 (2002) (holding that an agency interpretation is entitled to *Chevron* deference because, in part, of its long standing). The agency has maintained this position not only administratively but also in litigation. See *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (an agency's litigation position is entitled to *Chevron* deference when it represents a "fair and considered judgment" and not a "post hoc rationalization"). "The Commission has consistently defended this interpretation in the courts, arguing that a claim of discrimination under a disparate impact theory is cognizable under the ADEA." EEOC *Meacham* Br. 18-19.[19]

In the course of evaluating its litigation position, the EEOC has continued to take account of relevant developments. For example, the Commission has addressed this Court's decision in *Hazen Paper*, concluding that while *Hazen Paper* "recognized the primacy of the disparate-treatment theory" in the ADEA as in Title VII, it "does not deny the existence of the disparate impact theory." EEOC *Sitko* Br. 20.

Second, the EEOC's interpretation is also entitled to deference because it was originally promulgated (by the Secretary of Labor) contemporaneously with the enactment of the ADEA. "[T]he Department's earliest interpretations of the

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[19] For recent examples, see, *e.g.*, *Meacham* v. *Knolls Atomic Power Lab.* (CA2 No. 02-7474) (pending); *Sitko* v. *Goodyear Tire & Rubber* (CA6 No. 02-4083) (pending); *EEOC* v. *McDonnell Douglas Co.*, 191 F.3d 948 (CA8 1999); *Ellis* v. *United Airlines*, 73 F.3d 999 (CA10 1996).

ADEA recognize the viability of the disparate-impact theory." EEOC *Sitko* Br. 4. Those interpretations recognized "that the ADEA prohibited some age-neutral practices that had an adverse effect on older workers" – for example, they demanded that age-neutral evaluation factors such as quantity or quality of production have "a valid relationship to job requirements," and that age-neutral physical-fitness factors be "reasonably necessary for the specific work to be performed." EEOC *Meacham* Br. 12 (quoting 29 C.F.R. 806.103(f)(2), 806.103(f)(1)(i)); see also EEOC *Sitko* Br. 17 (explaining that EEOC's current interpretation reflects the "contemporaneous views of the agency initially entrusted with enforcing the ADEA). Departmental opinion letters similarly reflected this interpretation. See Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1105 & n.204 (1998) (reciting advisory opinions that asserted that "facially-neutral job requirements, such as testing, must be validated and job-related").

This contemporaneous understanding of the statute enhances the deference owed to the EEOC's regulation. This Court has observed that particular respect is due when an agency "was intimately involved in the drafting and consideration of the statute by Congress" and its "interpretation represents 'a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Aluminum Co. of Am.* v. *Cent. Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 390 (1984)). See *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 414 (1993); *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 412 (1985) (deferring to an EEOC interpretation inherited from the Department of Labor's contemporaneous construction of the ADEA's BFOQ exception). Such deference is particularly due here given that a report by the Department of Labor gave rise to the ADEA's adoption. *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969) (special deference to an agency's

contemporaneous construction applies "when the administrators participated in drafting and directly made known their views to Congress").

Third, *Chevron* deference is owed to the EEOC's regulation on the ground that the agency's consistent position has not been disturbed by Congress. As noted, the regulations of first the Department of Labor and later the EEOC have been consistent since 1968, while the federal courts uniformly agreed until 1993.[20] Moreover, during the twenty-seven-year period between the ADEA's adoption in 1967 and 1993, Congress amended the statute twelve times. Yet it never questioned the agencies' construction of the statute. And in both 1982 and 1991, Congress reaffirmed that the identical text of Title VII authorizes disparate impact claims.[21]

In these circumstances, Congress can fairly be deemed to have acquiesced in the regulatory construction of the statute. See *Boeing Co.* v. *United States*, 537 U.S. 437, 457 (2003) (noting that Congress's failure to legislatively override the preexisting regulatory interpretation when revising a statutory scheme "serves as persuasive evidence that Congress regarded that regulation as a correct implementation of its intent"); *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 118 (2002) ("By amending the law without repudiating the regulation, Congress 'suggests its consent to the [EEOC's] practice.'" (quoting *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S.

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[20] See, *e.g.*, *Fisher* v. *Transco Services-Milwaukee, Inc.*, 979 F.2d 1239, 1244-45 (CA7 1992); *Abbott* v. *Fed. Forge, Inc.*, 912 F.2d 867, 872 (CA6 1990); *Lowe* v. *Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1369-70 (CA2 1989).

[21] The Senate Report on the Older Workers' Benefit Protection Act of 1990 also expressly approves the EEOC's RFOA guidelines, as well as citing with approval *Laugesen* v. *Anaconda Co.*, 510 F.2d 310, 315 (CA6 1975), which recognizes that disparate impact claims are cognizable under the ADEA. See S. Rep. No. 263, at 29-30, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1535.

590, 600 n.17 (1981))); *Associated Dry Goods Corp.*, 449 U.S. at 600 n.17 ("In the 15 years during which the [EEOC] has consistently allowed limited disclosure to the charging party, Congress has never expressed its disapproval, and its silence in this regard suggests its consent to the Commission's practice."); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Finally, when *Chevron* deference is applied to the EEOC's construction of the statute, the result is obvious: the regulations are binding. The most that respondents could hope to establish is that the text of the ADEA is ambiguous, but the agency's construction resolves any such ambiguity. See *Chevron*, 467 U.S. at 843 (holding that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"); *id.* at 844 (regulations are entitled to "controlling weight"). Likewise, applying the second step of the *Chevron* analysis, the EEOC's view can only be considered reasonable, because it directly follows this Court's own analysis of the indistinguishable text of Title VII in *Griggs*. For this Court to find otherwise would require this Court to hold that *Griggs* was not only wrongly but *unreasonably* decided, and furthermore that a regulatory agency was *unreasonable* in deciding to follow an interpretation of identical statutory language in a then-recent, now longstanding decision of the United States Supreme Court. That conclusion is plainly untenable.[22]

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[22] Even if for some reason this Court were to decline to apply *Chevron* deference, the greatest degree of deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-40 (1944), would plainly apply here, and would produce the same result. Applying *Skidmore*, this Court has granted special weight to agency interpretations that are "well-reasoned" and "cogent," that "rest on a body of experience and informed judgment," and that are "of longstanding duration," all the case here. *Alaska Dep't of Envtl. Conservation* v. *EPA*, 124 S. Ct. 983, 1001 (2004). In *Alaska*, this Court, after applying those factors to an internal agency memorandum (a much less formal interpretation than the one at issue here), then deferred to the agency's view on the grounds that it was a "permissible" and "rational" construction of the statute. *Id.* at 1004; see also *id.* at 1001 (refusing to reject agency reading as "impermissible"). At the very least, the same level of deference is due here, and the EEOC's interpretation, which follows *Griggs* directly, is neither irrational nor impermissible.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

Pamela S. Karlan
559 Nathan Abbott Way
Stanford, CA 94305

Dennis L. Horn
Horn & Payne, PLLC
P.O. Box 2754
Madison, MS 39130

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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[23] Counsel for petitioners were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: Michael P. Abate, William B. Adams, and Jennifer J. Thomas. Clinic members David M. Cooper, Eric J. Feigin, Daniel S. Goldman, and Nicola J. Mrazek also participated.